IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 15885 of 2003
with
CIVIL APPLICATION NO. 557 OF 2004

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VISHNUBHAI JASHBHAI PATEL & ANOTHER

Versus

VALLABH VIDHANAGAR COMMERCIAL CO OP BANK LTD.

Appearance:
1. Special Civil Application No. 15885 of 2003
MR BP MUNSHI for Petitioner No. 1-2
MS NIRALI B MUNSHI for Petitioner No. 1-2
MR HM PARIKH for Respondent No. 1
MR.HEMANG H PARIKH for Respondent No. 1
RULE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 23/02/2004

3/3/2004

ORAL JUDGEMENT

The petitioners judgement debtors challenge the orders dated 14th November, 2002, 16th November, 2002 and 19th December, 2002, made below Applications Exhibits 9, 11 and 17 respectively and common order dated 24th January, 2003 made below Applications Exhibits 38 and 41 in Special Darkhast No. 92 of 2002, pending before the learned Civil Judge (Senior Division) Anand.

It appears that the petitioners had borrowed certain loan under six separate accounts from the respondent No.1 Vallabh Vidyanagar Commercial Co-operative Bank Limited (hereinafter referred to as "the Bank"). As the petitioners failed to discharge their liability towards the Bank, the Bank instituted Arbitration Suits before the Board of Nominees under the Gujarat Co-operative Societies Act, 1961. The said Suits came to be decreed. I am informed that there is no further challenge to the decrees passed in the said Suits and the same have become final. For execution of the said decrees the Bank obtained a recovery certificate from the Board of Nominees and moved the revenue authority to recover the outstanding amount from the petitioners as arrears of land revenue. Pending those proceedings, the Bank filed above referred Special Darkhast No.93 of 2002 in the Court of learned Civil Judge (Senior Division) for execution of the said decrees. In the said Special Darkhast, the Bank moved Application Exhibit 6 to confiscate the Passports of the petitioners herein. According to the Bank, the petitioners could not be served because they were not present at the given address and that the petitioners were likely to leave the country and to emigrate permanently to a foreign country. By the impugned order dated 14th November, 2002 made below Application Exhibit 9, the Court directed bailable warrant to issue upon the petitioners in the sum of Rs. 2 lakhs to secure the presence of the petitioners in the Court on 16th November, 2002. Pursuant to the said warrant, the petitioner No.1 was arrested and brought before the Court on 16th November, 2002. On the said date the petitioner No.1 could not furnish surety as ordered but produced his Passport before the Court. Pursuant to the Application Exhibit 11 made by the petitioner No.1, by impugned order dated 16th November, 2002, the learned Judge directed that the petitioner No.1 be released from the custody on production of the Passport issued by the Passport Authority of India. It was also observed that the petitioner No.1 would be entitled to recover the said Passport by giving surety in the sum of Rs. 2 lakhs. On

20th November, 2002, the petitioner No.1 made Application Exhibit 17 for setting aside the above referred order dated 16th November, 2002 and to return the Passport to the petitioner No.1. It was also mentioned that in view of the pending recovery proceedings by the revenue authority, the Bank had no authority to pursue the execution proceedings before the Civil Court under Civil Procedure Code. The said Application Exhibit 17 came to be rejected by impugned order dated 19th December, 2002. By impugned order dated 24th January, 2003, the learned Civil Judge has appointed Court Receiver to execute the decrees by attachment and sale of movable and immovable properties.

Learned Advocate Mr. Munshi has opposed the execution proceedings initiated by the Bank. It is submitted that the Bank could not have pursued two execution proceedings i.e. one by the revenue authority under the Bombay Land Revenue Code and the other before the Civil Court under the provisions of Code of Civil Procedure. The Bank having two remedies, the Bank ought to have elected to pursue one of the remedies. However, both the remedies could not have been pursued simultaneously. Mr. Munshi has also referred to several Provisions of Order 21 CPC. He has relied upon Rules 11, 13 and 37 of Order 21. He has particularly relied upon sub-rule (2) of Rule 11. He has submitted that the said sub-rule enjoins upon the decree holder to incorporate several information in the Application for execution. Clause (f) thereof particularly deals with the previous Applications made for the execution of the decree and the details thereof. In the present case, though the Bank had already invoked the execution machinery before the revenue authority, the said fact was not disclosed in the execution Application filed before the Civil Court. Thus, the Bank had suppressed material facts from the Civil Court. The Execution Application requires to be rejected on that ground alone. He has submitted that the procedure envisaged under Rule 13 of Order 21 has also been not complied with. Emphasis is laid over Rule 37 of Order 21. The said Rule 37 provides for execution of decree for the payment of money by the arrest and detention in the civil prison of a judgement debtor. Mr. Munshi has submitted that the said sub-rule envisages a written application to be made by the judgement creditor. It enjoins upon the Court to issue a notice calling upon the judgement debtor to appear before the Court and to show cause why he should not be committed to the Civil prison. In the present case, neither of the said mandatory requirements has been followed i.e. neither the judgement creditor had given written Application to

execute decree by detention of the petitioners in Civil prison, nor the Court had issued notice calling upon the petitioners to remain present before the Court and to show cause why the petitioners should not be committed to the Civil prison. Without following the said procedure the Court issued a warrant for arrest of the petitioners, arrested petitioner No.1 and committed him to the civil prison. Thus, a grave wrong has been done to the petitioners. Mr. Munshi has also submitted that the aforesaid provisions of arrest and detention in civil prison of a judgement debtor can be invoked only in a case where the judgement debtor has means to pay the money due and he adamantly refuses to discharge his liability. In support of this contention Mr. Munshi relied upon the judgements in the matters of Parekh Navnitlal Hiralal V. Bhagwatrai Maganlal Jariwala [1984 GLH 465], Rauf Abdul Majid V. Amnabai A. Gafar & another [1994 (2) GLR 1439], Patel Gordhan Kanjibhai V. Atlas Engineering Co. Works [1972 GLR 741] and P. Azeez Ahmed V. State Bank of India, Vaniyambadi [AIR 1995 (Madras) 194].

In the matter of Parekh Navnitlal Hiralal (supra) this Court has held that the power to enforce execution of a decree by arrest and detention in prison can be exercised by a Court only after giving the judgement debtor an opportunity of showing cause as to why he should not be committed to prison, and further only after the Court is satisfied that any of the conditions mentioned in proviso (a), (b) and (c) to Section 51 of the CPC are satisfied. The same is the proposition made in the matter of Rauf Abdul Majid (supra). The learned Judge has further said that "the executing Court must be satisfied that the judgement debtor has means to pay decretal amount or some substantial part thereof or refused or neglected to pay the same. A mere non-payment of the decretal amount does not necessarily amount to refusal or negligence to pay, but it requires some intention on the part of a judgement debtor, which may give rise to an inference that he has refused or neglected to pay." In the matter of Patel Gordhan Kanjibhai (supra) also this Court has enunciated the same principle. It has held that "it is for the judgement creditors to lead their evidence in support of their application for execution wherein they might have prayed for process of the Court for execution of the decree by arrest and detention of the judgement debtor in the civil prison and by their evidence they have to make out the grounds as prescribed in clause (b) of the proviso to Section 51 of the Code that the judgement debtor has or has had since the date of the decree, the means to pay

the amount of the decree or some substantial part thereof and that he refuses or neglects or has refused or neglected to pay the same. On plain reading of Rule 40 of Order 21 it is clear to me that it is only when the decree holder has by prima facie evidence adduced before the Executing Court in support of his application that there is a case for issue of process of the Court for execution of a decree by arrest and detention of the judgement debtor in civil prison, that, the judgement debtor has to be given an opportunity to show cause why he should not be committed to civil prison." Same is the view expressed by the Madras High Court in the matter of P. Azeez Ahmed (supra).

In my view, none of the aforesaid judgements shall apply to the facts in the present case. In the present case, the judgement creditors have not invoked provisions contained in Order 21 Rule 37 i.e. Bank has not applied for execution of the decree by arrest and detention of the judgement debtors in civil prison, nor the petitioners were ordered to be arrested and committed to civil prison to enforce execution of decree against them. The argument that the petitioners were ordered to be arrested in violation of the aforesaid provisions of law, the execution proceedings therefore shall fail, is misconceived and requires to be rejected.

In the present case the summons issued by the Executing Court could not be served upon the petitioners. The Bank, by Application Exhibit 6 made on 14th November, 2002, expressed its apprehension that the petitioners may leave the country and permanently emigrate to foreign country and in that case the execution proceedings shall be defeated. In answer to the said apprehension the Court by order dated 14th November, 2002, directed to secure the presence of the petitioners before the Court on 16th November, 2002, by issuing a bailable warrant. The said order cannot be said to be an order of arrest and detention in civil prison as envisaged under Order 21 Rule 37. The said arrest warrant had to be issued to secure the presence of the petitioners before the Court. In fact, the apprehension voiced by the Bank proved to be genuine in as much as the petitioner No.2 indeed left the country, her presence before the Court, therefore, could not be secured. I therefore see no substance in the challenge to the impugned order dated 14th November, 2002.

Date: 3.3.2004

Pursuant to the above referred order dated 14th

November, 2002, the petitioner No.1 was arrested and brought before the Court on 16th November, 2002. On the said date, the petitioner No.1 was ordered to be released from the custody on his producing the Passport issued by the Passport Authority of India. The petitioner No.1 was also given permission to recover the said Passport on his giving surety for a sum of Rs. 2 lakhs. In my opinion, the endeavour of the Court was to safeguard the execution of decree in favour of the judgement creditor. The impugned order was made to ensure that the petitioner No.1 did not avoid his liability under the decree passed against him.

The grievance of the petitioners that the judgement creditor ought to have elected one of the remedies available to it and could not have prosecuted both the remedies is justified. However, in the course of the proceedings before the Court below, the judgement creditor did undertake not to pursue remedy before the revenue authority and expressed its desire to prosecute the remedy before the Civil Court alone. The said intention was notified before the revenue authority also. Accordingly, the revenue authority had issued communication to the effect that no execution proceedings was being prosecuted by the judgement creditor before it. In view of the said communication, the grievance of the petitioners in this respect shall not survive.

The challenge to the impugned order dated 24th January, 2003 also is not sustainable. The said order has been made in accordance with the relevant Rules of Order 21 CPC to recover the decretal amount . The learned Judge cannot be said to have committed irregularity/illegality in making the impugned order dated 24th January, 2003.

In view of the above discussion, challenge to the impugned orders shall fail. Petition is dismissed with costs. Rule is discharged. Ad-interim order stands vacated.

Civil Application stands disposed of.

(Ms. R.M. Doshit, J.)

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